Supreme Court, U. S.
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No. 95-2012

In The

Supreme Court of the United States

October Term, 1995

MARGARET B. FENT and JERRY R. FENT,
wife and husband,

Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY;
OKLAHOMA CORPORATION COMMISSION and
STATE OF OKLAHOMA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

REPLY BRIEF TO JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

*James M. Little
Little & Morgan
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

Russell B. Fister
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543
Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether a state public utility commission may transfer a property interest to the utility's consumers without obtaining personam jurisdiction over consumers through minimum procedural due process notice.

II. Whether the Petitioners' property interest in their home was violated when the Oklahoma Corporation Commission approved the passing, relinquishing and precluding of Southwestern Bell Telephone Company's property interest in "inside wiring" to its customers without due process of law and just compensation?

III. Whether the property interests of over 92 million homes are affected by the deregulation and detariffing proceedings of governmental utility authorities in the 50 States by the forced transfer of local telephone company's "inside wiring" property interest to their customers without due process and just compensation is sufficient reason to grant this Writ of Certiorari?

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A. Where *all* parties admit and *all* documents show that an element (financial responsibility for maintenance costs) of Southwestern Bell Telephone Company's ("SWB") corporate property interests (inside wiring) was transferred to its individual customers, the question of whether formal "title" was or was not passed is a State non-issue for this federal question appeal 1

B. If this Court should hold that a transfer of an element of a property interest from SWB to Petitioners without their day in the Oklahoma Corporation Commission ("OCC") violated due process and is void, then the effects on all or the other parts of the OCC Order (severability) is a State non-issue for this federal question appeal 2

C. The State issues of (a) standing (rate payer and property holder) or (b) a time bar, were *not* discussed or used as a basis for the Oklahoma Court of Appeals decision and therefore cannot now be recreated or used by Respondents as a State issue for denial of the federal question appeal 3

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REPLY BRIEF TO JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Petitioners respectfully file their reply brief to the respondents' joint brief in opposition to petition for certiorari pursuant to Rule 15.6 of the Supreme Court of the United States.

The petitioner's reply brief will limit themselves "to new points raised in the brief in opposition" and to clarify any parts of the joint brief in opposition that either misstates the facts or the law, unfairly denigrate the importance of the questions presented, or add to or misstate the issues that would properly be before the Court if certiorari were granted. Rule 15.2.

REPLY ARGUMENT

A. Where *all* parties admit and *all* documents show that an element (financial responsibility for maintenance costs) of Southwestern Bell Telephone Company's ("SWB") corporate property interests (inside wiring) was transferred to its individual customers, the question of whether formal "title" was or was not passed is a State non-issue for this federal question appeal.

The Oklahoma Corporation Commissioner's Order at Petitioners' Appendix, page C-7 states:

> " * * * Order No. 292337, among other things, set rates and *approved* an optional inside wiring maintenance service. * * * ." (Emphasis supplied.)

The conflict between (a) OCC Order No. 292337 ordering the "passing of ownership" and (b) SWB's General Exchange Tariff showing ownership remaining the property of SWB is a State non-issue for this federal appeal.

That is, because all the documents and all the parties admit that the financial maintenance responsibility for SWB's inside wiring was transferred to its customers. Property is comprised of many elements. Financial responsibility for a property's maintenance is one of those elements. The question of whether formal "title" was or was not passed to customers is a State non-issue for this federal appeal.

Again, the real federal issue being the transfer of an element of property (maintenance of inside wiring) to utility's consumers without obtaining personam jurisdiction over consumers through minimum procedural due process notice.

B. If this Court should hold that a transfer of an element of a property interest from SWB to petitioners without their day in the Oklahoma Corporation Commission ("OCC") violated due process and is void, then the effects on all of the other parts of the OCC Order (severability) is a State non-issue for this federal question appeal.

The Petitioners attacked OCC Order No. 292337 because a part of the order established and required SWB customers to financially maintain SWB's inside wiring.

The question of whether all or a part of the OCC Order No. 292337 will be void if this court finds the ex

parte transfer of an element of a property interest violated the Due Process Clause was never raised in this Petition for Writ of Certiorari.

Respondents offered Okla. Stat. Tit. 75 § 11a, "Construction of statutes – Severability" and their counter "Question Presented" as an attempt to create a State issue for this federal question appeal. The Respondents proposed counter "Question Presented" is:

> "Whether the Oklahoma Court of Appeals Division 2 correctly held, under Oklahoma law, that an order of the Oklahoma Corporation Commission establishing rates and charges for telephone service was not *voidable in its entirety* on account of alleged constitutional deficiencies in an "unconnected and independent" seven-word provision addressing ownership rights in telephone wiring inside Oklahoma homes and businesses," (Emphasis supplied.)

If this court should hold that the transfer was void, then the governmental forced inside wiring maintenance program will be dead in this State and the other 49 States.

Again, the Respondents attempt to create a State issue for this federal question appeal.

C. The State issues of (a) standing (rate payer and property holder) or (b) a time bar, were not discussed or used as a basis for the Oklahoma Court of Appeals decision and therefore cannot now be recreated or used by Respondents as a State issue for denial of the federal question appeal.

The Oklahoma Court of Appeals opinion allowed Petitioners' attack on the OCC Order and did *not* discuss

or dismiss Petitioners' appeal on the basis of: (a) State issue of standing, (b) thirty day appeal requirement for parties to an action or (c) a lack of a property interest. See Petitioners' Appendix pages A1-A7. All of these State non-issues not in the Oklahoma Court of Appeals memorandum opinion cannot now be recreated for this federal question appeal.

D. Petitioners' constitutional issues were raised, discussed and denied in the Oklahoma Court of Appeals decision.

The Petitioners' federal constitutional challenges were dismissed in the OCC when it held:

> "The Commission finds no merit in Applicants' allegation that they have been deprived of due process on the basis of being deprived of * * * property; * * * ." Petitioners' Appendix, page C-9.

The Oklahoma Court of Appeals decision states:

> " * * * . They (Fents) challenged the order on jurisdictional and other constitutional grounds. * * * ." Petitioners' Appendix, page A-3.

And,

> " * * * . The Fents have alleged that OCC Order No. 292337 * * * in violation of a myriad of federal and state constitutional provisions. However, even if this court were to agree with the Fents that OCC Order No. 292337 attempted, unconstitutional, to * * * ." Petitioners' Appendix, page A-4.

The Oklahoma Court of Appeal's opinion reached the conclusion that even if the alleged offending portion (transferring financial maintenance responsibility) was constitutionally infirm, the remaining order would be viable legislation. Petitioners' Appendix, page A-7.

The dissenting opinion in the Supreme Court of Oklahoma preserved our issue by stating:

> " * * * whether the Oklahoma Corporation Commission may transfer property rights to the utility's consumers without obtaining in personam jurisdiction over the consumers through minimum procedural due process notice" Petitioners' Appendix, page B-1.

Therefore, Respondents' allegation that there is no federal question preserved in this appeal is false.

CONCLUSION

The Petitioners are *not* asking this court to answer State issues. For all the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set for a full hearing by the Court. In the alternative, *certiorari* should be granted and the decision below summarily reversed, sending the case back to the Supreme

Court of Oklahoma and its Court of Appeal of the State of Oklahoma, Division No. 2.

Respectfully submitted,

*James M. Little, OBA #5465
(Counsel of Record)
Little & Morgan
3035 N.W. 63rd, Ste. 200
Oklahoma City, Oklahoma 73116
(405) 848-0346

Russell B. Fister, OBA #2946
1613 First National Center West
120 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-3543
Attorneys for Petitioners

*Counsel of Record